

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

*Encl
PL-1
7802*

FILE: B-190743

DATE September 25, 1978

MATTER OF: The George Sollitt Construction Company

DIGEST:

1. In response to IFB which calls for inclusion of all applicable taxes, bid which excludes applicable tax (United States District Court found only portions rather than all of State Sales and Use Tax unconstitutional) is nonresponsive where amount of tax excluded is not specifically identified in bid.
2. In view of conclusion that agency properly rejected low bid as non-responsive, GAO does not find that agency acted arbitrarily or capriciously toward low bidder-claimant so as to support claim for bid preparation costs.

Invitation for bids (IFB) No. CI-77-EE11 was issued by the Environmental Protection Agency (EPA) for the construction of the EPA Region X Fish Laboratory in Manchester, Washington. Clause 31(a) of the IFB's General Conditions provided:

"Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State and local taxes and duties."

Bids were opened on October 19, 1977, and The George Sollitt Construction Company was the low bidder. However, Sollitt was informed by EPA that, in view of the cited clause 31(a), its bid was being rejected as nonresponsive because Sollitt stated therein that the bid did not include the Washington State Sales and Use Tax.

On November 23, Sollitt filed a protest in our Office against the rejection of its bid and the resultant award to the second low bidder, Christenson Raber Vief & Associates, Inc. (CRK), in the middle of November.

Sollitt subsequently filed Civil Action No. C77-900S in the United States District Court for the Western District of Washington, requesting that the court enjoin the commencement by CRK of work on the project and direct EPA to award the contract to Sollitt. Our Office then declined consideration of the protest at that time because the material issues involved in the protest were before a court of competent jurisdiction. The George Sollitt Construction Company, B-190743, January 9, 1978, 78-1 CPD 17.

Subsequently, on April 25, 1978, the court stayed all matters pending in Civil Action No. C77-900S and requested that our Office proceed with the review of Sollitt's bid protest.

The protester contends that the Washington State Sales and Use Tax was an inapplicable tax within the meaning of clause 31(a) and was properly excluded from its lump-sum bid price. Sollitt therefore asserts that its bid was improperly held nonresponsive and requests that the contract with CRK be terminated and award made to Sollitt as the low responsive bidder. In the event that the contract with CRK is not terminated, Sollitt asserts a claim for bid preparation costs.

In support of its position, the protester cites the November 3, 1977, decision of the United States District Court for the Western District of Washington. That decision held that the imposition of the sales tax on materials purchased by contractors for incorporation into Federal construction projects and the use tax on material furnished to contractors

by the Federal Government for incorporation into such projects both unlawfully discriminated against contractors who dealt with the United States and was therefore unconstitutional when applied in that manner. United States v. State of Washington, Civil Action No. C77-355. (The decision has been appealed.) Therefore, Sollitt concludes that the exclusion of the tax did not render its aid nonresponsive and makes several contentions to support this proposition.

While we do not necessarily agree with the protester's contentions, we do not believe it is necessary to consider these matters. All of Sollitt's contentions stem from the basic premise that the Washington State Sales and Use Tax is an inapplicable tax as the court held. However, we do not agree with the premise that the court found the tax was totally inapplicable to the solicitation.

Specifically, we note that in United States v. State of Washington, supra, the court upheld the constitutionality of the application of the use tax to Federal construction projects, as follows:

"The Court finds, however, that the imposition of use taxes upon materials furnished by the United States to federal project contractors for use in connection with those projects but not for incorporation into those projects does not result in any constitutionally impermissible discrimination against federal project contractors, inasmuch as that same use tax is imposed upon contractors working on state or private projects. The imposition of this tax upon federal project contractors does not in consequence result in any discrimination against those who contract with the United States."

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In this regard, the contractor has submitted the following comments, to which EPA has subscribed.

"The Washington statutes in question, as applied by the State, require contractors on federal projects to pay sales and use tax on materials incorporated into the finished product. It was this particular application of the statute which Judge Voorhees found unlawful. However, contractors on federal projects in Washington State have always been required to pay sales and use tax on materials which are not incorporated into the project, but which are used or expended on the job. This would include form lumber, lubricants, equipment rentals, temporary supports and structures of all kinds, and many similar items. This application of the tax was not held unconstitutional. In fact, Judge Voorhees specifically ruled that the imposition of use taxes upon materials furnished by the United States to federal project contractors for use in connection with those projects, but not for incorporation into those projects, is not unconstitutional. Accordingly, even if the court's ruling is upheld on appeal, Washington sales and use tax will still be applicable to materials expended on federal projects, but not incorporated into the finished product.

"The qualifying statement added to the Sollitt bid makes no distinction between the application of sales and use tax to materials incorporated into the job, and its application to materials

expended or used on the job. Under these circumstances, we submit that the added statement which totally excludes all Washington sales and use tax renders the Sollitt bid nonresponsive on its face."

Sollitt, while not disagreeing with the applicability of the taxes mentioned by the contractor, attempts to rebut this argument by comparing this situation with our prior holding in B-147073, February 6, 1962. There, the low bidder exempted from its bid "State or city sales tax." We held that the contracting officer was correct in treating the low bid as responsive since there was an exemption from the payment of the State and city sales tax on sales to the United States or its agencies and instrumentalities. Sollitt continues, as follows:

"Similarly, based on the authority of [B-147073, supra.] the EPA's argument that Sollitt's bid should be rejected since the Court's decision arguably did not exclude all Washington State sales and use tax on materials which any contractor may purchase and not incorporate in the Federal project, must also fail. * * * the exemption from California state taxes as discussed did not exclude taxation of all of the purchases that Bethlehem made in the State of California for any purpose, be it for support of its contract facilities or for use in connection with, but not incorporated into the work. * * * the Comptroller General must have held that this tax was de minimis for purposes of evaluating

the bid. Likewise any alleged effect on Sollitt's and other bidders must be considered de minimis and within the risks assumed by the bidder."

Contrary to Sollitt's assertion, in B-147073, supra, we did not hold that the low bidder excluded portions of the applicable State and city sales taxes which were de minimis for purposes of bid evaluation. We held only that the exclusion of the taxes was proper since no sales taxes were applicable to the contract.

We have previously held that a tax which is applicable or is of doubtful applicability must be included in the bid. 37 Comp. Gen. 864, 868 (1958); 20 Comp. Gen. 752 (1941). Unless otherwise specified in the documents constituting an invitation for bids, the inclusion of the tax clause in a contract form, which is in turn included in the invitation, constitutes notice to all bidders that bids are solicited and will be evaluated on a tax-included basis. 41 Comp. Gen. 289 (1961). A bid will be considered even if it excludes a tax not specified for exclusion by the IFB, if the class and amount of the tax are specified in the bid. 37 Comp. Gen., supra. When a bid is submitted on a tax-exclusive basis, the class and amount of the tax excluded are required so as to permit the procuring agency to evaluate all bids on an equal basis. Absent that, the bid must be considered nonresponsive. 41 Comp. Gen., supra.

Given the fact that the Sollitt bid gives no indication of the amount of taxes excluded from the bid price and the undisputed fact that at least a portion of the Washington State Sales and Use Tax was applicable at the time of bid opening, we must conclude that the bid was properly rejected as nonresponsive to the invitation.


Sollitt also asserts a claim of an unspecified dollar amount for bid preparation costs. The standard

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for determining whether to allow recovery for bid preparation costs is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192; Ted Company 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. In view of the above, we do not find that EPA acted arbitrarily or capriciously toward Sollitt.

Accordingly, the protest and the claim are denied.


Acting Comptroller General
of the United States